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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 JOANNE G.,¹) Case No. EDCV 18-0997-JPR
12)
13 Plaintiff,)
14) MEMORANDUM DECISION AND ORDER
15 v.) REVERSING COMMISSIONER
16)
17 NANCY A. BERRYHILL, Acting)
18 Commissioner of Social)
19 Security,)
20)
21 Defendant.)
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27 I. PROCEEDINGS

28 Plaintiff seeks review of the Commissioner's final decision denying her application for Social Security disability income benefits ("DIB"). The parties consented to the jurisdiction of the undersigned under 28 U.S.C. § 636(c). The matter is before the Court on the parties' Joint Stipulation, filed March 6, 2019, which the Court has taken under submission without oral argument. For the reasons stated below, the Commissioner's decision is reversed and this action is remanded for further proceedings.

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1 **II. BACKGROUND**

2 Plaintiff was born in 1980. (Administrative Record ("AR")
3 46, 175.) She completed two years of college. (AR 196.) She
4 last worked as a medical assistant and was a sales associate and
5 loader before that. (AR 233.)

6 On May 28, 2014, Plaintiff applied for DIB, alleging that
7 she had been unable to work since January 8, 2014, because of
8 issues with her right shoulder, left knee, lower back, and left
9 hip. (AR 63, 175-78.) After her application was denied
10 initially (AR 83-84, 106-09) and on reconsideration (AR 104, 112-
11 16), she requested a hearing before an Administrative Law Judge
12 (AR 117-18). A hearing was held on January 10, 2017, at which
13 Plaintiff, who was not represented by counsel, testified, as did
14 a vocational expert. (AR 44-61.) In a written decision issued
15 January 19, 2017, the ALJ found Plaintiff not disabled. (AR 24-
16 38.) With the assistance of counsel, she sought Appeals Council
17 review (AR 269-72), which was denied on April 2, 2018 (AR 1-6).
18 This action followed.

19 **III. STANDARD OF REVIEW**

20 Under 42 U.S.C. § 405(g), a district court may review the
21 Commissioner's decision to deny benefits. The ALJ's findings and
22 decision should be upheld if they are free of legal error and
23 supported by substantial evidence based on the record as a whole.
24 See Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra v.
25 Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence
26 means such evidence as a reasonable person might accept as
27 adequate to support a conclusion. Richardson, 402 U.S. at 401;
28 Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007). It

1 is more than a scintilla but less than a preponderance.
2 Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec.
3 Admin., 466 F.3d 880, 882 (9th Cir. 2006)). "[W]hatever the
4 meaning of 'substantial' in other contexts, the threshold for
5 such evidentiary sufficiency is not high." Biestek v. Berryhill,
6 139 S. Ct. 1148, 1154 (2019). To determine whether substantial
7 evidence supports a finding, the reviewing court "must review the
8 administrative record as a whole, weighing both the evidence that
9 supports and the evidence that detracts from the Commissioner's
10 conclusion." Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.
11 1998). "If the evidence can reasonably support either affirming
12 or reversing," the reviewing court "may not substitute its
13 judgment" for the Commissioner's. Id. at 720-21.

14 **IV. THE EVALUATION OF DISABILITY**

15 People are "disabled" for purposes of receiving Social
16 Security benefits if they are unable to engage in any substantial
17 gainful activity owing to a physical or mental impairment that is
18 expected to result in death or has lasted, or is expected to
19 last, for a continuous period of at least 12 months. 42 U.S.C.
20 § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir.
21 1992).

22 **A. The Five-Step Evaluation Process**

23 The ALJ follows a five-step evaluation process to assess
24 whether a claimant is disabled. 20 C.F.R. § 404.1520(a)(4);
25 Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995) (as
26 amended Apr. 9, 1996). In the first step, the Commissioner must
27 determine whether the claimant is currently engaged in
28 substantial gainful activity; if so, the claimant is not disabled

1 and the claim must be denied. § 404.1520(a)(4)(i).

2 If the claimant is not engaged in substantial gainful
3 activity, the second step requires the Commissioner to determine
4 whether the claimant has a "severe" impairment or combination of
5 impairments significantly limiting her ability to do basic work
6 activities; if not, the claimant is not disabled and her claim
7 must be denied. § 404.1520(a)(4)(ii).

8 If the claimant has a "severe" impairment or combination of
9 impairments, the third step requires the Commissioner to
10 determine whether the impairment or combination of impairments
11 meets or equals an impairment in the Listing of Impairments set
12 forth at 20 C.F.R. part 404, subpart P, appendix 1; if so,
13 disability is conclusively presumed. § 404.1520(a)(4)(iii).

14 If the claimant's impairment or combination of impairments
15 does not meet or equal an impairment in the Listing, the fourth
16 step requires the Commissioner to determine whether the claimant
17 has sufficient residual functional capacity ("RFC")² to perform
18 her past work; if so, she is not disabled and the claim must be
19 denied. § 404.1520(a)(4)(iv). The claimant has the burden of
20 proving she is unable to perform past relevant work. Drouin, 966
21 F.2d at 1257. If the claimant meets that burden, a prima facie
22 case of disability is established. Id. If that happens or if
23 the claimant has no past relevant work, the Commissioner then
24 bears the burden of establishing that the claimant is not

25
26 ² RFC is what a claimant can do despite existing exertional
27 and nonexertional limitations. § 404.1545; see Cooper v.
28 Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989). The
Commissioner assesses the claimant's RFC between steps three and
four. Laborin v. Berryhill, 867 F.3d 1151, 1153 (9th Cir. 2017)
(citing § 416.920(a)(4)).

1 disabled because she can perform other substantial gainful work
2 available in the national economy. § 404.1520(a)(4)(v); Drouin,
3 966 F.2d at 1257. That determination comprises the fifth and
4 final step in the sequential analysis. § 404.1520(a)(4)(v);
5 Lester, 81 F.3d at 828 n.5; Drouin, 966 F.2d at 1257.

6 B. The ALJ's Application of the Five-Step Process

7 At step one, the ALJ found that Plaintiff last met the
8 insured status requirements of the Social Security Act on
9 December 31, 2015, and had not engaged in substantial gainful
10 activity since January 8, 2014, the alleged onset date.³ (AR
11 26.) At step two, he concluded that through the date last
12 insured Plaintiff had severe impairments of

13 status post right shoulder arthroscopic rotator cuff and
14 glenohumeral joint debridement with rotator cuff repair,
15 right shoulder sprain with impingement, status post left
16 knee arthroscopic m[e]niscectomy, status post
17 arthroscopic meniscectomy, lumbosacral strain/sprain,
18 status post left hip arthroscopic surgery, right knee
19 sprain, cervical degenerative disc disease, lumbar
20 degenerative disc disease, major depressive disorder and
21 obesity.

22 (Id.) At step three, he determined that Plaintiff's impairments
23 did not meet or equal a listing. (AR 27-28.) At step four, he
24 found that Plaintiff's RFC allowed her to

25
26 ³ The record contains some conflicting evidence of when
27 Plaintiff last worked (see, e.g., AR 727, 730 (Plaintiff
28 indicating that she was working on "modified" basis on Apr. 30,
2014), but she stated many times that she last worked January 8,
2014 (see, e.g., AR 884), and the ALJ apparently determined that
any work after that date was not substantial gainful activity.

1 lift and/or carry ten pounds occasionally, less than ten
2 pounds frequently; . . . stand or walk for two hours out
3 of an eight-hour workday with normal breaks and the use
4 of a cane; . . . sit for six hours out of an eight-hour
5 workday with normal breaks; . . . occasionally perform
6 postural activities; . . . cannot climb ladders, ropes or
7 scaffolds or crawl; . . . must avoid unprotected heights
8 and moving machinery; . . . can frequently reach,
9 including reaching overhead bilaterally; . . . frequently
10 handle, finger, feel, push or pull with the upper
11 extremities bilaterally; . . . frequently operate foot
12 controls with the right lower extremity and occasionally
13 operate foot controls with the left lower extremity; the
14 claimant is limited to simple routine tasks [and] object
15 oriented tasks; the claimant can frequently interact with
16 coworkers, supervisors and the public; the claimant
17 cannot perform inherently stressful tasks such as taking
18 complaints.

19 (AR 28.) The ALJ found that Plaintiff could not do any past
20 relevant work. (AR 36.) But at step five, he determined that
21 given her age, education, work experience, and RFC, she could
22 perform two representative jobs in the national economy. (AR
23 37.) Thus, he found Plaintiff not disabled. (AR 38.)

1 **V. DISCUSSION⁴**

2 Plaintiff argues that the ALJ erred by improperly finding
3 that she could perform alternative work and discounting her
4 subjective pain testimony and statements. (See J. Stip. at 5.)
5 As discussed below, remand is necessary based on the ALJ's
6 improper discounting of her subjective statements. Because
7 Defendant concedes that the ALJ erred in identifying alternative
8 work but argues that the error was harmless (see id. at 10-12),
9 the ALJ on remand can simply revisit and correct the analysis and
10 record.⁵ Accordingly, the Court does not reach that issue.

11 A. The ALJ Did Not Properly Evaluate Plaintiff's
12 Subjective Symptom Testimony

13 As Plaintiff acknowledges, the ALJ cited her "routine and
14 conservative care" (id. at 15) and daily activities (id. at 17-
15 19) in addition to providing a "general discussion of the medical
16 evidence" (id. at 15) to support partially discounting her
17 subjective symptom testimony and statements (see generally AR 31-
18

19 ⁴ In Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018), the Supreme
20 Court recently held that ALJs of the Securities and Exchange
21 Commission are "Officers of the United States" and thus subject
22 to the Appointments Clause. To the extent Lucia applies to
23 Social Security ALJs, Plaintiff has forfeited the issue by
24 failing to raise it during her administrative proceedings. (See
25 AR 44-61, 269-72); Meanel v. Apfel, 172 F.3d 1111, 1115 (9th Cir.
1999) (as amended) (plaintiff forfeits issues not raised before
ALJ or Appeals Council); see also generally Kabani & Co. v. SEC,
733 F. App'x 918, 919 (9th Cir. 2018) (rejecting Lucia challenge
because plaintiff did not raise it during administrative
proceedings), pet. for cert. filed, ___ U.S.L.W. ___ (U.S. Feb. 22,
2019) (No. 18-1117).

26 ⁵ Defendant also argues that the claim has been forfeited
27 because Plaintiff did not raise it during her administrative
28 proceedings. (J. Stip. at 12.) But because Plaintiff was not
represented by counsel before the ALJ and remand is in any event
required, the Court declines to invoke forfeiture.

36). But, as explained below, substantial evidence did not support his finding that her treatment was conservative or that her daily activities were "compatible with competitive work" (AR 36), and inconsistency with objective evidence alone is an insufficient reason to discount subjective pain testimony. Thus, remand is necessary.

1. Applicable law

An ALJ's assessment of a claimant's allegations concerning the severity of her symptoms is entitled to "great weight." Weetman v. Sullivan, 877 F.2d 20, 22 (9th Cir. 1989) (as amended) (citation omitted); Nyman v. Heckler, 779 F.2d 528, 531 (9th Cir. 1985) (as amended Feb. 24, 1986). "[T]he ALJ is not required to believe every allegation of disabling pain, or else disability benefits would be available for the asking, a result plainly contrary to 42 U.S.C. § 423(d)(5)(A)." Molina v. Astrue, 674 F.3d 1104, 1112 (9th Cir. 2012) (citing Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989)).

In evaluating a claimant's subjective symptom testimony, the ALJ engages in a two-step analysis. See Lingenfelter, 504 F.3d at 1035-36; see also SSR 16-3p, 2016 WL 1119029, at *3 (Mar. 16, 2016).⁶ "First, the ALJ must determine whether the claimant has

⁶ The Commissioner applies SSR 16-3p to all "determinations and decisions on or after March 28, 2016." Soc. Sec. Admin., Policy Interpretation Ruling, SSR 16-3p n.27, https://www.ssa.gov/OP_Home/rulings/di/01/SSR2016-03-di-01.html (last visited May 16, 2019). Thus, it applies here. Although the new ruling eliminates the term "credibility" and focuses on "consistency" instead, much of the relevant case law refers to credibility. But as the Ninth Circuit has clarified, SSR 16-3p

makes clear what our precedent already required: that assessments of an individual's testimony by an ALJ are

1 presented objective medical evidence of an underlying impairment
2 [that] could reasonably be expected to produce the pain or other
3 symptoms alleged." Lingenfelter, 504 F.3d at 1036 (citation
4 omitted). If such objective medical evidence exists, the ALJ may
5 not reject a claimant's testimony "simply because there is no
6 showing that the impairment can reasonably produce the degree of
7 symptom alleged." Smolen v. Chater, 80 F.3d 1273, 1282 (9th Cir.
8 1996) (emphasis in original), superseded in part by statute on
9 other grounds,

10 § 404.1529.

11 If the claimant meets the first test, the ALJ may discount
12 the claimant's subjective symptom testimony only if he makes
13 specific findings that support the conclusion. See Berry v.
14 Astrue, 622 F.3d 1228, 1234 (9th Cir. 2010). Absent a finding or
15 affirmative evidence of malingering, the ALJ must provide a
16 "clear and convincing" reason for rejecting the claimant's
17 testimony. Brown-Hunter v. Colvin, 806 F.3d 487, 493 (9th Cir.
18 2015) (as amended) (citing Lingenfelter, 504 F.3d at 1036);
19 Treichler v. Comm'r of Soc. Sec. Admin., 775 F.3d 1090, 1102 (9th
20 Cir. 2014). If the ALJ's evaluation of a plaintiff's alleged
21 symptoms is supported by substantial evidence in the record, the
22 reviewing court "may not engage in second-guessing." Thomas v.

24 designed to "evaluate the intensity and persistence of
25 symptoms after [the ALJ] find[s] that the individual has
26 a medically determinable impairment(s) that could
27 reasonably be expected to produce those symptoms," and
not to delve into wide-ranging scrutiny of the claimant's
character and apparent truthfulness.

28 Trevizo v. Berryhill, 871 F.3d 664, 678 n.5 (9th Cir. 2017) (as
amended) (alterations in original) (quoting SSR 16-3p).

1 Barnhart, 278 F.3d 947, 959 (9th Cir. 2002).

2 Inconsistency with evidence in the medical record is a
3 "sufficient basis" for rejecting a claimant's subjective symptom
4 testimony. Carmickle v. Comm'r, Soc. Sec. Admin., 533 F.3d 1155,
5 1161 (9th Cir. 2008); see also Morgan v. Comm'r of Soc. Sec.
6 Admin., 169 F.3d 595, 600 (9th Cir. 1999) (upholding "conflict
7 between [plaintiff's] testimony of subjective complaints and the
8 objective medical evidence in the record" as "specific and
9 substantial" reason undermining statements). But it "cannot form
10 the sole basis for discounting pain testimony." Burch v.
11 Barnhart, 400 F.3d 676, 681 (9th Cir. 2005); Rollins v.
12 Massanari, 261 F.3d 853, 857 (9th Cir. 2001) (citing then-current
13 version of § 404.1529(c)(2)).

14 2. Relevant background

15 a. *Plaintiff's statements*

16 In a February 2014 report, Plaintiff marked that she was
17 feeling "[w]orse" since her last doctor's appointment and had
18 recently gone to the emergency room "for nerve damage." (AR
19 712.) She had "[j]oint pain/swelling," "[n]umbness/tingling,"
20 and "[d]ifficulty walking." (Id.)

21 In a July 2014 function report, Plaintiff wrote that she was
22 "in constant pain that makes it hard . . . to move around." (AR
23 215.) She had "shoulder pain, neck pain, low back, knee pain and
24 hip pain constantly" and couldn't "push, pull, bend, lift or
25 reach overhead." (Id.) On an average day, she would brush her
26 teeth, shower, and make herself something to eat but otherwise
27 would "lay down or sit down and watch TV." (AR 216.) She
28 specified that she made "sandwiches, frozen dinners, microwavable

1 dinners or rice and chicken" and spent "5 to 15 min[utes]"
2 cooking, with "breaks in between." (AR 217.)

3 Plaintiff reported that she struggled to sleep because it
4 was "hard" to "get comfortable," and she woke up "throughout the
5 night" because "the pain [was] so intense." (AR 216.) She had
6 difficulty dressing herself, writing that "it[']s hard for me to
7 bend down and put my underwear on or my pants, put on my socks[,]
8 my shoes" and "my bra and my shirt." (Id.) Personal grooming
9 was also a challenge: she had "trouble scrubbing [her] body and
10 washing [her] hair," "shaving," and "sitting down and getting up"
11 from the toilet. (Id.) She did not do chores because of "the
12 pain" and had to have someone help with her laundry "every two
13 weeks." (AR 217.) She went outside "once in awhile" when she
14 "need[ed] to," and she could "go out alone" and drive. (AR 218.)
15 She shopped "once a month" for "30 min[utes] or so" for "hygiene
16 products" and groceries. (Id.) Her only hobby was watching TV;
17 she noted that before getting hurt, she "hardly watch[ed] TV" but
18 did so now because of her "constant pain" and inability to do
19 anything else. (AR 219.) Every two weeks, she spent time "with
20 others," and they would "talk, watch movies or help me with the
21 thing[s] I need help with" and "have dinner." (Id.)⁷ She didn't
22 go out socially. (AR 219-20.)

23 In a check-the-box portion of the report, Plaintiff marked
24 that she had trouble lifting, squatting, bending, standing,

26 ⁷ A friend filled out a third-party function report and
27 wrote that she "or someone else" would "come and help
28 [Plaintiff]" "about every 2 weeks." (AR 226; see also AR 228
("We watch TV and movies and I help her with things she need
[sic] and hang out and talk.").)

1 reaching, walking, sitting, kneeling, stair-climbing, and
2 completing tasks. (AR 220.) She couldn't lift more than 10
3 pounds⁸ and needed to rest for "15-30 min[utes]" after "less
4 th[a]n half a block" of walking. (Id.) When "moving around,"
5 she used a "cane and [b]race," which were prescribed by a doctor.
6 (AR 221; see also AR 899.)

7 On November 3, 2014, Plaintiff filled out a form, indicating
8 that she felt the "[s]ame" since her last doctor's visit and
9 still experienced "[w]eakness" in her back, knee, and hip;
10 "[n]umbness" in her foot and knee; "[l]ocking" in her hip, back,
11 and knee; and "[s]welling" in her back and knee. (AR 895.) Her
12 pain was "aggravated with" overhead reaching, lifting, pushing,
13 pulling, twisting, bending, stooping, kneeling, walking, and
14 sitting. (Id.)

15 In an undated disability-report update, Plaintiff wrote that
16 since August 2014, her left knee had "worsen[ed]" and she would
17 "be having knee surgery in the near future." (AR 241.) Her hip
18 was "not better" and had a "pinch."⁹ (Id.) Her shoulder had
19 also "worsen[ed]." (Id.) Since July 2014, she was feeling "more
20 depress[ed]," her anxiety had "worsen[ed]," and she was suffering
21 "[p]anic attacks" and having "trouble sleep[i]ng at night."
22 (Id.) In another undated update, she wrote that since September
23 2014, her knee and hip had "worsen[ed]" and her "surgeon
24

25 ⁸ Plaintiff actually wrote, "I can't lift less th[a]n 10
26 pounds with the back and shoulder knee hip [sic] pain," but she
27 most likely intended to write that she couldn't lift "more" than
that amount. (AR 220.)

28 ⁹ Plaintiff had hip surgery on August 21, 2014. (See AR
764.)

1 requested a second surgery for both body parts." (AR 250.) Her
2 hip "constantly" locked, and the knee and hip pain made it "hard
3 . . . to walk, sleep and move around." (Id.)¹⁰ Her "depression,
4 anxiety and lower back ha[d also] worsen[ed]." (Id.) She was
5 "[w]aiting on surgery" and getting tests, injections, and
6 medication in the interim. (AR 252.)

7 At the January 10, 2017 hearing, Plaintiff testified that
8 she had "knee pain," "severe nerve damage on both . . . legs,"
9 "bone on bone grinding" in her knee,¹¹ "severe pain through [her]
10 groin into [her] hip," back pain, neck pain, right-shoulder pain,
11 and numbness and tingling in her "hand."¹² (AR 48.) She
12 explained that a disc in her back "collapsed" and that "[t]hey're
13 saying that I need back surgery." (Id.; see also AR 54
14 (reiterating that "they just want to focus on the back now,
15 because it has completely collapsed, my bone").)¹³ She asserted
16 that "they don't want to touch [my hip], because I'm too young
17 also for a hip replacement." (AR 54.)

18
19 ¹⁰ Plaintiff indicated that an MRI on February 6, 2015,
20 showed that her hip was "deter[ior]ating" (AR 250), but no such
MRI appears in the record.

21 ¹¹ She did not specify which knee, but she likely meant her
22 left. (See, e.g., AR 63.)

23 ¹² Plaintiff later clarified that her right hand was the one
24 with "numbness and tingling," explaining that although she is
right-handed, she used her left hand more "because my [right]
hand's always numb." (AR 51.)

25 ¹³ The record includes a lumbar MRI from June 2016 showing
26 "[s]evere loss of disc height and disc dessication" at "L4-5"
(see AR 1029-30) but does not include any doctor's notes
27 recommending back surgery. Although Defendant writes that
28 "doctors recommended spinal fusion" for Plaintiff (J. Stip. at
26), the pages she cites in support of that concession do not
support it.

1 Plaintiff testified that "it hurts to sit" and "stand" and
2 "even hurts to lay down." (AR 49.) She could sit at "most . . .
3 about 15 to 20 minutes" before experiencing pain in her legs,
4 back, and hip. (Id.) She felt a "constant pinch between my
5 shoulder and my arm and my neck from sitting" or "even standing."
6 (Id.) Her feet swelled so much "to the point where I can't even
7 put on shoes sometimes." (Id.) She could stand for "about 15,
8 20 minutes" but noted that "[i]t's very painful" and repeated
9 that her doctor said she needed back surgery "to take out the
10 disc, take a piece of my bone, fuse it to the back of my bone and
11 then put on screws." (AR 50.) She used her cane "at all times"
12 (id.), including when going to the bathroom, "because it's hard
13 for me to . . . stand up and sit down" (AR 51), although she also
14 said that she used the cane at home "depending [on] what [she
15 was] doing" (id.). She had had "two knee surgeries" already and
16 said that "[t]hey say I need a knee replacement." (AR 54.) She
17 estimated that she could walk "about ten minutes maybe" but tried
18 not to walk at all. (Id.) She spent "a lot" of time in bed,
19 estimating "about eight hours, nine" total during the day. (AR
20 52.) She could not work because "[t]he repetitive stooping,
21 bending, standing, sitting, writing is very painful." (AR 54.)

22 Plaintiff's niece sometimes visited and helped her get food;
23 "sometimes she'll even go to the grocery store or have somebody
24 help me or drive me." (AR 52.) Plaintiff was able to drive but
25 "hardly" did so because of the numbness in her hand and pinching
26 in her back. (AR 53.) She lived with her sister's ex-boyfriend
27 and his kids. (Id.) She "hardly" cooked, relying on food she
28 could microwave. (Id.)

1 Plaintiff said she had "really bad anxiety" and "depression"
2 (AR 49) and felt "sad" because she didn't see how she would be
3 able to recover, work, or have children (AR 55).

4 b. *Plaintiff's treatment records*¹⁴

5 In February 2014, as part of his ongoing progress reports
6 for Plaintiff's workers'-compensation case, orthopedic surgeon
7 Thomas Phillips noted that his objective findings were
8 "unchanged," presumably from December 2013 notes indicating left-
9 knee and right-shoulder "derangement" and some positive
10 impingement results. (AR 696-97, 700; see also AR 685.) He
11 found evidence of a "labral tear" in the left hip and a medial
12 meniscus tear in the left knee (AR 700, 706)¹⁵ and diagnosed her
13 with right-shoulder derangement,¹⁶ lumbar myalgia, lumbar
14 myospasm, lumbar neuritis/radiculitis, lumbar sprain/strain,
15 left-hip labral tear, left-knee derangement, and left-knee medial
16 meniscus tear. (AR 707.) He referred her to a "hip arthroscopy
17 surgeon for [left] hip arthroscopy" and requested authorization
18 for "narcotic medication management." (AR 700, 707.) He
19 prescribed Norco¹⁷ and Flexeril.¹⁸ (AR 703, 707.)

21 ¹⁴ Plaintiff's history of injuries and treatment began in
22 2005 (see, e.g., AR 374, 408-29 (summarizing her treatment
23 history)), but because her alleged onset date is January 8, 2014
(AR 175), only records after then are considered here.

24 ¹⁵ An arthrogram of Plaintiff's left knee conducted on
25 January 21, 2014, showed a medial meniscus tear, cartilage
thinning, and "[m]ild degenerative bone changes." (AR 927.)

26 ¹⁶ An arthrogram of Plaintiff's right shoulder conducted on
27 January 22, 2014, showed "[p]ostsurgical defects . . . in the
humeral head" but otherwise unremarkable results. (AR 928-29.)

28 ¹⁷ Norco is brand-name hydrocodone-acetaminophen. See
Norco, WebMD, <https://www.webmd.com/drugs/2/drug-63/norco-oral/>

1 At an appointment later that month, Dr. Phillips noted that
2 Plaintiff had recently gone to the emergency room for numbness
3 and tingling in both hands and "burning pain" down both legs.
4 (AR 710.) He observed that she had decreased sensation in her
5 feet. (Id.) He referred her for narcotic medication management
6 (id.) and prescribed Medrol¹⁹ (AR 713).

7 In March 2014, Dr. Phillips again referred Plaintiff to a
8 "hip arthroscopy surgeon" and "pain management . . . for narcotic
9 med[ical] management." (AR 720.) He also prescribed a lumbar-
10 spine brace, left-knee brace, and TENS unit. (AR 721.) His
11 April 2014 notes indicated that her condition was "unchanged."
12 (AR 725.) Her lumbar range of motion "was restricted due to pain
13 and spasm," and "there was tenderness to palpation, guarding and
14 spasm." (AR 730.) Her left hip also had "tenderness to
15 palpation" and "restricted" range of motion "due to pain." (Id.)
16 Her left knee had "tenderness to palpation . . . over the joint
17 line," but range of motion was "normal." (AR 731.) He
18 prescribed tramadol,²⁰ "recommend[ed] her to proceed with hip
19 _____
20 details (last visited May 16, 2019).

21 ¹⁸ Flexeril (which has the generic name cyclobenzaprine) is
22 a muscle relaxant used short term to treat muscle spasms. See
23 Flexeril Tablet, WebMD, <https://www.webmd.com/drugs/2/drug-11372/flexeril-oral/details> (last visited May 16, 2019).

24 ¹⁹ Medrol is a corticosteroid hormone that decreases the
25 immune system's responses to various disorders and diseases. See
26 Medrol, WebMD, <https://www.webmd.com/drugs/2/drug-11321/medrol-pak-oral/details> (last visited May 16, 2019).

27 ²⁰ Tramadol helps relieve moderate to moderately severe
28 pain. See Tramadol HCL, WebMD, <https://www.webmd.com/drugs/2/drug-4398-5239/tramadol-oral/tramadol-oral/details> (last visited May 16, 2019). It is "similar to opioid (narcotic) analgesics."
Id.

1 surgeon and pain management," and again "request[ed] an
2 authorization for lumbar spine brace, left knee brace and TENS
3 unit." (AR 732.) His May 2014 notes are largely the same. (See
4 AR 735.)

5 On June 18, 2014, Plaintiff met with Dr. Justin Saliman, an
6 orthopedic surgeon, for her left-hip pain. (AR 753.) He
7 observed a "[p]ositive labral stress test," "[p]ositive pain on
8 hip flexion with internal rotation," and some "mild" "tenderness
9 to palpation." (Id.) On June 20, 2014, Plaintiff had a pelvic
10 x-ray that showed signs of "chronic labral degeneration" and
11 possible predisposition to "impingement" in her left hip. (AR
12 751-52.)

13 In July 2014, Dr. Phillips noted that "pain management" was
14 "approved" and Plaintiff could now "schedule and proceed." (AR
15 755.) She was still awaiting authorization for the lumbar-spine
16 brace, left-knee brace, TENS unit, and hip surgery. (Id.)

17 On August 11, 2014, Plaintiff met with pain specialist Dr.
18 Rohini Patel. (AR 826.) He observed "tender lumbar para[spinal]
19 and sacroiliac area," "[d]ecreased range of motion" in the lumbar
20 spine, and an "antalgic" gait. (Id.) The rest of the physical
21 examination yielded normal results (id.), but a nerve conduction
22 study showed "evidence of left L5-S1 radiculopathy" (AR 828). On
23 August 14, 2014, she saw pain specialist Dr. Jonathan Kohan for
24 an initial consultation. (AR 930.) He found "tenderness to
25 palpation over paravertebral, trapezius, deltoid, and rhomboids
26 area with moderate spasm" as well as "tenderness over paraspinous
27 muscles." (AR 935.) Range of motion in her shoulder was normal,
28 but he observed "tenderness." (AR 936.) Her gait was

1 "antalgic," but she could "ambulate without a cane" and "perform
2 toe and heel walk with pain in the back." (AR 937.) He found
3 evidence of pain and spasm in her lumbar spine, but her straight-
4 leg-raise tests²¹ were negative bilaterally. (Id.) Her left
5 knee was positive for tenderness and the McMurray test.²² (AR
6 938.) He noted that Dr. Phillips's office had prescribed a
7 regimen of "tramadol, ibuprofen creams and Flexeril[,] which have
8 been beneficial partial and temporary." (AR 940.) He suggested
9 that an epidural injection for the "low back and lower extremity
10 symptoms" might be helpful but decided to see how she fared with
11 medication for the next month. (Id.)

12 On August 21, 2014, Plaintiff underwent arthroscopic hip
13 surgery for "femoroplasty,"²³ "[a]cetabuloplasty,"²⁴ "[l]abral
14 repair,"²⁵ and "[s]ynovectomy."²⁶ (AR 764.) While doing the
15

16 ²¹ A straight-leg-raise test checks the mechanical movement
17 of neurological tissues and their sensitivity to stress and
18 compression when disc herniation is suspected. See Straight Leg
19 Raise Test, Physiopedia, [https://www.physio-pedia.com/](https://www.physio-pedia.com/Straight_Leg_Raise_Test)
20 Straight_Leg_Raise_Test (last visited May 16, 2019).

21 ²² A McMurray test detects internal tears in the knee joint.
22 See Diagnosing Knee Injury with a McMurray Test, verywellhealth,
23 <https://www.verywellhealth.com/mcmurray-test-2549599> (last
24 updated Dec. 1, 2018).

25 ²³ Femoroplasty is the removal of bony irregularities from
26 and reshaping of the femur. See Femoroplasty, Wiktionary,
27 <https://en.wiktionary.org/wiki/femoroplasty> (last updated Jan. 3,
2019).

28 ²⁴ Acetabuloplasty is a surgical procedure to correct
dislocation of the hip. See Acetabuloplasty, Encyclopedia.com,
[https://www.encyclopedia.com/caregiving/dictionaries-thesauruses-](https://www.encyclopedia.com/caregiving/dictionaries-thesauruses-pictures-and-press-releases/acetabuloplasty)
pictures-and-press-releases/acetabuloplasty (last visited May 16,
2019).

²⁵ Surgical labral repair involves repairing or removing the
torn part of the labrum. See Hip Labral Repair, Mayo Clinic,

1 procedures Dr. Saliman found evidence of "CAM impingement,"
2 bruising, "extensive synovitis," "pincer impingement," and "an
3 impinging transition zone between the femoral head and neck."
4 (Id.) He remarked that her hip issues had previously been
5 "resistant to conservative treatment modalities." (Id.)

6 At a follow-up appointment on September 3, 2014, Plaintiff
7 reported "mild foot numbness" and said that she "fell twice since
8 surgery." (AR 819.) She began physical therapy around the same
9 time. (See AR 820.)

10 On September 4, 2014, Dr. Kohan filled out a progress report
11 for Plaintiff and prescribed Norco. (AR 921.) She apparently
12 reported "improved functional capacity with activities of daily
13 living, self grooming, and chores around the house." (Id.) On
14 September 12, 2014, Dr. Kohan noted that Norco had not been
15 provided for some reason, and he resubmitted a request for Norco
16 and Zanaflex²⁷ to be taken twice a day. (AR 924.) He reported
17 that "multiple orthopedic complaints increased dramatically after
18 she was not provided with the recommended medication" (AR 923)

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[https://www.mayoclinic.org/diseases-conditions/hip-labral-tear/
23 diagnosis-treatment/drc-20354878](https://www.mayoclinic.org/diseases-conditions/hip-labral-tear/diagnosis-treatment/drc-20354878) (last updated Mar. 7, 2018).

24 ²⁶ Synovectomy is the removal of inflamed joint tissue that
25 can cause pain and limit functionality. See Synovectomy for
26 Rheumatoid Arthritis, Univ. Wis. Health, [https://
www.uwhealth.org/health/topic/surgicaldetail/synovectomy-for-
rheumatoid-arthritis/aa18893.html](https://www.uwhealth.org/health/topic/surgicaldetail/synovectomy-for-rheumatoid-arthritis/aa18893.html) (last updated June 10, 2018).

27 ²⁷ Zanaflex treats muscle spasms. See Zanaflex, WebMD,
28 <https://www.webmd.com/drugs/2/drug-14706/zanaflex-oral/details>
(last visited May 16, 2019).

1 and flagged that ibuprofen, tramadol, gabapentin,²⁸ and Flexeril
2 had all failed to help. (AR 923-24). He observed that her gait
3 was "antalgic severely" and that she required crutches for
4 ambulation. (AR 924.)

5 On October 2, 2014, Dr. Kohan determined that Plaintiff met
6 "criteria . . . for lumbar epidural injections." (AR 918.) In
7 the meantime, she was "awaiting authorization for all the
8 medications we requested," "maintained currently" on Norco,
9 Zanaflex, and Fiorinal,²⁹ and was doing "physical therapy for the
10 left hip." (Id.) Physical examination revealed "spasm and
11 tenderness of the paravertebral muscles of the cervical and
12 lumbar spines with decreased range of motion in flexion and
13 extension." (Id.) He observed "[d]iscomfort" when he was
14 examining her left hip and knee. (AR 919.) He concluded that
15 "[m]edications are addressing her nociceptive pain³⁰ adequately"
16 but that the "clinical impression, co[rro]brating diagnostic
17 studies, and failure to improve with conservative treatment
18 provide[d] substantial medical evidence" and justification for
19 "lumbar epidural injection at level L5-S1." (Id.)

21 ²⁸ Gabapentin is an anticonvulsant used sometimes to relieve
22 nerve pain. See Gabapentin, WebMD, [https://www.webmd.com/](https://www.webmd.com/drugs/2/drug-14208-8217/gabapentin-oral/gabapentin-oral/details)
23 [drugs/2/drug-14208-8217/gabapentin-oral/gabapentin-oral/details](https://www.webmd.com/drugs/2/drug-14208-8217/gabapentin-oral/gabapentin-oral/details)
(last visited May 16, 2019).

24 ²⁹ Fiorinal is combination butalbital, aspirin, and
25 caffeine, and it treats tension headaches. See Fiorinal, WebMD,
<https://www.webmd.com/drugs/2/drug-15819/fiorinal-oral/details>
(last visited May 16, 2019).

26 ³⁰ Nociceptive pain refers to pain from physical damage to
27 the body, as opposed to neuropathic pain, which is caused by
28 nerve damage. See Nociceptive and neuropathic pain: What are
they?, MedicalNewsToday, [https://www.medicalnewstoday.com/](https://www.medicalnewstoday.com/articles/319895.php)
[articles/319895.php](https://www.medicalnewstoday.com/articles/319895.php) (last updated Nov. 2, 2017).

1 At an October 6, 2014 appointment, Dr. Phillips observed
2 that Plaintiff's leg pain was "unchanged" and that knee surgery
3 was "pending" for "after hip recovery." (AR 799.) On October
4 15, 2014, she reported to her hip surgeon, Dr. Saliman, that she
5 had a "50% pain reduction from her pre-surgical state." (AR
6 779.) The physical exam, however, revealed a "[m]oderate labral
7 stress test," "[p]ositive pain on hip flexion with internal
8 rotation," and "severe . . . tenderness to palpation." (Id.) He
9 ordered a cortisone "XRAY [f]luoroscopy [g]uided [t]herapeutic
10 [i]njection." (AR 822, 824; see also AR 823.) On October 21,
11 2014, a representative for Dr. Phillips wrote that Plaintiff
12 would likely be able to return to modified work on November 3,
13 2014, pending treatment records from her hip surgeon and
14 continued pain management. (AR 820.)

15 On November 3, 2014, Dr. Phillips noted that Plaintiff
16 recently went to the ER and was going to have a "[h]ip injection"
17 the next day. (AR 893.) Her range of motion "was restricted due
18 to pain and spasm," and "[t]here were trigger points noticeable
19 in the lumbar paraspinal muscles bilaterally." (AR 898.) Her
20 range of motion in the left knee was "normal," but "there was
21 tenderness to palpation . . . over the joint line." (Id.) He
22 requested authorization for a cane and a TENS unit; braces for
23 her knee and lumbar spine had already been "dispensed." (AR 899-
24 900.) He wrote that "left knee surgery might be considered after
25 hip treatment" and that she was "temporarily totally disabled."³¹

26
27 ³¹ The ALJ rejected the finding that Plaintiff was
28 temporarily totally disabled (AR 900) but seemed to accept Dr.
Phillips's "clinical findings," noting that they were "consistent
with a conclusion that the claimant could do work with the

1 (AR 900.) On December 15, 2014, Dr. Phillips noted that left-
2 knee surgery was "[l]ikely" and that his objective findings were
3 "unchanged." (AR 903.) Plaintiff reported that she was doing
4 physical therapy but felt the "[s]ame." (AR 905.)

5 On November 19, 2014, Dr. Kohan "formally appeal[ed] the
6 denial" for a lumbar epidural steroid injection, arguing among
7 other things that Plaintiff had "lower back pain radiating into
8 the left lower extremity with numbness and weakness," "difficulty
9 with bending, stooping, squatting, and prolonged standing and
10 walking," "decreased sensation with pain over the left L5 and S1
11 dermatomes," and "weakness with toe and heel walking on the left
12 side as well as discomfort with flexion and extension of the left
13 knee against gravity." (AR 915-16.) He noted that she had
14 "attempted extensive conservative management including
15 medications and therapy but remain[ed] considerably symptomatic."
16 (AR 916.) On December 11, 2014, Dr. Kohan observed that
17 Plaintiff was "visibly uncomfortable," with "[s]pasm and
18 tenderness" and "[d]ecreased sensation with pain." (AR 912.) He
19 diagnosed her with "[a]cute flare-up of myofascial pain of
20 cervical and lumbar spines" and "[c]ervical sprain/strain."
21 (Id.) He again "appealed a denied lumbar epidural injection"
22 (id.), arguing that she was "suffering from chronic pain" and was
23 "not on a heavy opioid regimen" (AR 913). He injected her back
24 in two places with lidocaine.³² (Id.)

25 _____
26 limitations noted herein" (AR 35).

27 ³² Lidocaine is an anesthetic used to help reduce pain. See
28 lidocaine injection, Michigan Medicine, <https://www.uofmhealth.org/health-library/d00059v1> (last visited May 16, 2019).

1 On January 8, 2015, Plaintiff complained to Dr. Kohan that
2 her "low back and leg ha[d] only worsened, even though she had
3 some improvement" after the injections. (AR 910.) He continued
4 to "appeal[] the determination that resulted in denial of her
5 lumbar epidural" (id.) and was also "trying to appeal" an
6 apparent reduction in her medication (AR 911). He reiterated
7 that "[s]he remains a candidate to undergo epidural steroid
8 injection to the lumbar spine area, as all other modes of
9 treatment have failed and . . . complaints and physical exam
10 findings continue to be consistent with her MRI findings and
11 examination." (Id.)

12 On January 16, 2015, Plaintiff saw Dr. Kohan again. (AR
13 907.) She was "still awaiting . . . the recommended epidural
14 injection." (Id.) She was taking Norco and Zanaflex daily and
15 Fiorinal "occasionally . . . to address her chronic back pain and
16 headaches." (Id.) She reported that her pain was a "9/10
17 without use of any medication." (Id.) She "recently underwent
18 injection" of her left hip, and it was "beneficial." (AR 907-
19 08.) The doctor continued to recommend "epidural steroid
20 injection" and reiterated that "this has already been submitted
21 for review on two occasions" and "[s]he will be scheduled if she
22 is authorized." (AR 908.)

23 On March 18, 2015, Plaintiff saw orthopedic surgeon Lee
24 Silver for her workers'-compensation case. (AR 975.) He
25 observed "diffuse tenderness" in the neck but "no paravertebral
26 spasm, guarding, or asymmetric range of motion." (AR 977.) Her
27 back had "diffuse" tenderness and "significant paravertebral
28 spasm, guarding, and asymmetric range of motion." (Id.) Her

1 right shoulder had "impingement." (AR 979.) Plaintiff reported
2 to Dr. Silver that her hip surgery "did not benefit her." (AR
3 980.) He "restricted [her] from repetitive work with the right
4 upper extremity above the shoulder level," "repetitive squatting,
5 climbing, kneeling, bending and stooping," lifting "greater than
6 20 pounds," and "running and jumping." (AR 980-81.)³³ Dr.
7 Silver filed two supplemental updates after this examination (see
8 AR 967-73 (reports dated May and Sept. 2015 including review of
9 materials only)), but the record does not include any treatment
10 records from anyone between March 18, 2015, and June 9, 2016.³⁴

11 On June 9, 2016, Plaintiff underwent an MRI of her lumbar
12 spine, which showed "[d]egenerative disc changes at L4-5 and L5-
13 S1 with mild facet arthropathy," "[m]ild spinal canal narrowing
14 at L4-5 associated with broad-based disc bulge," "[m]oderate
15 spinal canal narrowing at L5-S1 associated with broad-based disc
16 bulge," and "annular tears in the posterior intervertebral
17 dis[c]s at these levels." (AR 1030.)

22 ³³ The ALJ gave "great weight" to Dr. Silver's opinion,
23 finding that the "functional limitations" he assessed were
24 "consistent with the claimant's residual functional capacity and
25 . . . supported by the positive objective findings noted during
his examination of the claimant." (AR 35.)

26 ³⁴ Dr. Silver wrote that he reviewed a progress report from
27 Dr. Phillips dated March 9, 2015, but it does not appear in the
28 record. (See AR 972.) Dr. Phillips apparently recommended
continued follow-up with "conservative measures" and noted that
"approval [was] needed for an arthroscopic left knee medial
meniscus surgery." (Id.)

1 c. *The ALJ's findings relating to Plaintiff's*
2 *subjective symptom statements*

3 The ALJ found that Plaintiff's "medically determinable
4 impairments could reasonably be expected to provide [her] alleged
5 symptoms," but her "statements concerning the intensity,
6 persistence and limiting effects of these symptoms are not
7 entirely consistent with the medical evidence and other evidence
8 in the record." (AR 31.) He gave her the benefit of the doubt,
9 however, by imposing greater limits in her RFC than those
10 assessed by the state-agency medical consultants. (See AR 34.)

11 The ALJ pointed to Plaintiff's activities of daily living to
12 justify partially discounting her subjective symptom statements
13 and testimony. (AR 30.) He noted at step three that Plaintiff
14 had "mild restriction" in "activities of daily living" and
15 engaged in "personal grooming activities, prepared simple meals,
16 assisted with laundry, could go places alone, could drive a
17 vehicle and occasionally shopped." (AR 27.) He repeated this
18 list of activities in his discussion of her subjective symptoms
19 (see AR 30) but also acknowledged her testimony that "she spent
20 approximately eight hours a day laying down," "rarely drove,"
21 "microwaved meals," and "experienced difficulty with dressing,
22 bathing, caring for her hair, shaving and using the restroom" (AR
23 29). He determined that "[a]lthough [her] activities of daily
24 living were somewhat limited, some of the physical and mental
25 abilities and social interactions required in order to perform
26 these activities are the same as those necessary for obtaining
27 and maintaining employment." (AR 30.)

28 The ALJ also found that "[t]he treatment records reveal

1 [she] received routine, conservative, and non-emergency treatment
2 since the alleged onset date." (AR 31.) He did not specify
3 which treatments he considered to be conservative or routine and
4 instead provided a summary of her test results and the opinions
5 of several doctors. (See generally AR 31-35.)

6 3. Analysis

7 The ALJ gave three reasons for partially discounting
8 Plaintiff's subjective pain testimony: inconsistency with the
9 objective medical evidence, inconsistency with activities of
10 daily living, and conservative treatment. (See generally AR 29-
11 31.) But her activities of daily living were not inconsistent
12 with her subjective statements, her treatment was not
13 conservative or routine, and inconsistency with objective medical
14 evidence is an insufficient reason on its own. See Burch, 400
15 F.3d at 681. Accordingly, the ALJ erred.

16 a. *Activities of daily living*

17 The ALJ found that Plaintiff's activities of daily living
18 were inconsistent with the alleged degree of her physical
19 limitations. (See AR 30; see also AR 27.) An ALJ may discount a
20 claimant's subjective symptom testimony when it is inconsistent
21 with her daily activities. See Molina, 674 F.3d at 1113. "Even
22 where those [daily] activities suggest some difficulty
23 functioning, they may be grounds for discrediting the claimant's
24 testimony to the extent that they contradict claims of a totally
25 debilitating impairment." Id.

26 The ALJ concluded that because Plaintiff engaged in
27 "personal grooming activities, prepared simple meals, assisted
28 with laundry, could go places alone, could drive a vehicle and

1 occasionally shopped" (AR 27), she was only "somewhat limited"
2 (AR 30). But Plaintiff clearly expressed that she had difficulty
3 with personal grooming (see, e.g., AR 51, 216), needed a friend
4 to help her with laundry and chores (see, e.g., AR 217), and
5 relied on others to help her shop for necessities (see AR 52-53).
6 Her testimony and function report consistently indicated that she
7 struggled to go out at all. (See, e.g., AR 53 (testifying that
8 she "hardly" drove because of numbness in her hand and pinching
9 in her back and that "most of the time somebody drives me"), 218
10 (she went out "once a month" for "hygiene products" and
11 groceries), 219 (friend came over every two weeks to help with
12 chores and keep her company), 220 (she didn't go out to social
13 events)). Nothing in the record contradicted Plaintiff's
14 testimony and statements on these points; indeed, the ALJ seemed
15 to accept them but did not take into account the limited extent
16 to which Plaintiff could do the activities on her own.

17 Moreover, the ALJ failed to explain how Plaintiff's ability
18 to do activities like shopping once a month and microwaving meals
19 would translate to a work environment. See Trevizo v. Berryhill,
20 871 F.3d 664, 682 (9th Cir. 2017) (as amended) ("[M]any home
21 activities are not easily transferable to what may be the more
22 grueling environment of the workplace, where it might be
23 impossible to periodically rest or take medication." (citation
24 omitted)); Orn v. Astrue, 495 F.3d 625, 638 (9th Cir. 2007) ("The
25 ALJ must make specific findings relating to the daily activities
26 and their transferability to conclude that [they] warrant an
27 adverse credibility determination." (citation omitted)).

28 The fact that Plaintiff could, with difficulty and breaks

1 for rest, partake in some basic activities and go out alone when
2 necessary was not inconsistent with her claims that she could not
3 work. (See, e.g., AR 54 (testifying that she needed to lie down
4 up to nine hours during day and couldn't work because "repetitive
5 stooping, bending, standing, sitting, [and] writing [was] very
6 painful").) "[I]mpairments that . . . preclude work and all the
7 pressures of a workplace environment will often be consistent
8 with doing more than merely resting in bed all day." Garrison v.
9 Colvin, 759 F.3d 995, 1016 (9th Cir. 2014) (citation omitted)
10 (holding that "ability to talk on the phone, prepare meals once
11 or twice a day, occasionally clean one's room, and . . . care for
12 one's daughter, all while taking frequent hours-long rests,
13 avoiding any heavy lifting, and lying in bed" was "consistent
14 with an inability to function in a workplace environment").

15 Accordingly, Plaintiff's daily activities were not a clear
16 and convincing reason to discount her subjective symptom
17 testimony and statements.

18 *b. Conservative treatment*

19 The ALJ also discounted Plaintiff's statements regarding her
20 physical pain because "[t]he treatment records reveal the
21 claimant received routine, conservative, and non-emergency
22 treatment since the alleged onset date." (AR 31.) Conservative
23 treatment is a "sufficient" reason to reject a claimant's
24 subjective symptom testimony. Parra, 481 F.3d at 751 (citation
25 omitted). But the ALJ failed to show that conservative treatment
26 was a clear and convincing reason in this case.

27 The ALJ did not specify which treatments in the record were
28 conservative or routine, nor did he suggest any possible

1 treatments that Plaintiff could have had but didn't receive.
2 (See generally AR 31-33.) Such lack of specificity is not clear
3 and convincing. See Moody v. Berryhill, No. 16-CV-03646-JSC,
4 2017 WL 3215353, at *13 (N.D. Cal. July 28, 2017) (reversing in
5 part because ALJ "did not point to what 'conservative' treatment
6 Plaintiff was receiving, nor did she explain what additional
7 treatment Plaintiff was supposed to receive").

8 In any event, the ALJ erred by categorizing all of
9 Plaintiff's treatment as conservative or routine. (AR 31.)
10 Arthroscopic surgery is generally not considered conservative.
11 See, e.g., Hernandez v. Colvin, No. CV 12-3320-SP., 2013 WL
12 1245978, at *8 & n.7 (C.D. Cal. Mar. 25, 2013) (finding that
13 plaintiff's care "did not remain conservative" because doctor
14 recommended arthroscopic shoulder surgery and plaintiff underwent
15 surgery two days after ALJ decision).³⁵ Injections are also
16 generally not considered conservative, at least not when the
17 plaintiff has received numerous injections on a regular basis.
18 See Christie v. Astrue, No. CV 10-3448-PJW., 2011 WL 4368189, at
19 *4 (C.D. Cal. Sept. 16, 2011) (refusing to characterize
20 injections, epidurals, and narcotic pain medication as
21

22 ³⁵ In fact, the hip surgeon wrote that he performed the
23 surgery because Plaintiff's issues were "resistant to
24 conservative treatment." (AR 764.) And although the record
25 indicates that the August 2014 left-hip surgery provided some
26 relief (see, e.g., AR 825 (Plaintiff reporting "50% pain
27 reduction from her pre-surgical state")), it also shows that any
28 such relief was fleeting (see, e.g., AR 824 (cortisone injection
in left hip in Oct. 2014), 907-08 (treating pain specialist
noting in Jan. 2015 that Plaintiff "recently underwent [left-hip]
injection"), 956 (consulting orthopedist finding "[r]ange of
motion of the left hip is 50% of expected with a fair amount of
pain" in Aug. 2016)).

1 "conservative"). Not only did Plaintiff receive hip and back
2 injections (see, e.g., AR 824, 910, 913), but treating pain
3 specialist Kohan also persistently sought approval for her to
4 receive epidural injections (see, e.g., AR 908, 910-11, 913) and
5 stronger and increased pain medications (see AR 910-11), arguing
6 that "all other modes of treatment have failed" (AR 911; see also
7 AR 924 (listing medications that had not been effective)). Dr.
8 Kohan's ongoing treatment, including injections, narcotic
9 medications, and many requests for epidural authorizations, was
10 not conservative or routine. See Samaniego v. Astrue, No. EDCV
11 11-865 JC., 2012 WL 254030, at *4 (C.D. Cal. Jan. 27, 2012)
12 (treatment not conservative when claimant was treated "on a
13 continuing basis" with steroid and anesthetic "trigger point
14 injections," occasional epidural injections, and narcotic
15 medication and doctor recommended surgery).

16 Similarly, treating orthopedist Phillips repeatedly noted
17 that Plaintiff's condition was "unchanged" despite physical
18 therapy and pain medications. (See, e.g., AR 903); see also
19 Hernandez, 2013 WL 1245978, at *7 (finding that when plaintiff
20 "continued to experience pain" with medication, "pain was [not]
21 controlled," and so "help[]" from medication "was not a clear and
22 convincing reason to discount plaintiff's credibility"). He also
23 twice remarked that Plaintiff had sought emergency-room care (see
24 AR 710, 893), undermining the ALJ's statement that all of
25 Plaintiff's treatment had been "non-emergency" (AR 31).³⁶

26 Furthermore, several treating and examining doctors
27

28 ³⁶ The AR does not include records from these emergency-room
visits, however.

1 suggested that further surgeries were likely. (See, e.g., AR 903
2 (treating orthopedist noting in Dec. 2014 that left-knee surgery
3 was "likely" after her hip had healed sufficiently), 958
4 (consulting orthopedist remarking in 2016 that "claimant is
5 scheduled to have multiple surgeries").) Although Defendant is
6 correct that no additional surgeries are documented in the record
7 (see J. Stip. at 27), the record suggests that certain aggressive
8 treatments had been delayed over the years because of insurance
9 issues, allowances for healing time, and concerns about
10 Plaintiff's age (see, e.g., AR 54, 700, 707, 799, 918). Cf. Orn,
11 495 F.3d at 638 (noting that failure to seek treatment may be
12 basis for adverse credibility finding unless good reason exists
13 for not pursuing it); Hernandez, 2013 WL 1245978, at *8 (waiting
14 for insurance authorization is good reason).

15 Thus, the ALJ erred by improperly assessing Plaintiff's
16 treatments as conservative and routine.

17 c. *Inconsistency with medical evidence*

18 The ALJ recounted the findings and opinions of several
19 doctors at length (see generally AR 30-35), but even if he was
20 justified in finding that the objective medical evidence was not
21 consistent with Plaintiff's subjective complaints, that alone is
22 not a sufficient reason to discount them. See Burch, 400 F.3d at
23 680 ("[A]n ALJ may not reject a claimant's subjective complaints
24 based solely on a lack of medical evidence to fully corroborate
25 the alleged severity of pain."); Gama v. Colvin, 611 F. App'x
26 445, 446 (9th Cir. 2015) (when one reason ALJ gave for
27 discounting plaintiff's credibility was erroneous and "only
28 remaining reason . . . was a lack of objective medical evidence,"

1 "error was not harmless").

2 Because two of the three reasons the ALJ gave for
3 discounting Plaintiff's subjective pain statements and testimony
4 were not supported by substantial evidence and the other was
5 insufficient by itself, remand is warranted.

6 B. Remand for Further Proceedings Is Appropriate

7 When an ALJ errs, as here, the Court "ordinarily must remand
8 . . . for further proceedings." Leon v. Berryhill, 880 F.3d
9 1041, 1045 (9th Cir. 2017) (as amended Jan. 25, 2018); see also
10 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000) (as
11 amended). The Court has discretion to do so or to award benefits
12 under the "credit-as-true" rule. Leon, 880 F.3d at 1045
13 (citation omitted). "[A] direct award of benefits was intended
14 as a rare and prophylactic exception to the ordinary remand
15 rule[.]" Id. The "decision of whether to remand for further
16 proceedings turns upon the likely utility of such proceedings,"
17 Harman, 211 F.3d at 1179, and when an "ALJ makes a legal error,
18 but the record is uncertain and ambiguous, the proper approach is
19 to remand the case to the agency," Leon, 880 F.3d at 1045 (citing
20 Treichler, 775 F.3d at 1105).


21 Here, further administrative proceedings would serve the
22 useful purpose of allowing the ALJ to give proper consideration
23 to Plaintiff's subjective symptom testimony. See Arredondo v.
24 Colvin, No. CV 15-01927-RAO, 2016 WL 3902307, at *7 (C.D. Cal.
25 July 18, 2016) (remand "rather than an award of benefits"
26 appropriate when only valid reason ALJ gave for discounting
27 plaintiff's subjective pain testimony was "lack of supporting
28 objective evidence"). If the ALJ chooses to discount Plaintiff's

1 subjective symptoms on remand, he can then provide an adequate
2 discussion of the reasons why. See Payan v. Colvin, 672 F. App'x
3 732, 733 (9th Cir. 2016). Because many doctors assessed that
4 Plaintiff could work with limitations, as noted by the ALJ (see
5 generally AR 30-35; see also J. Stip. at 27 (Defendant arguing
6 same)), the Court has serious doubt as to whether Plaintiff was
7 disabled during any or all of the relevant period. For this
8 reason, too, remand is appropriate. See Garrison, 759 F.3d at
9 1021 (recognizing flexibility to remand for further proceedings
10 when "record as a whole creates serious doubt that [plaintiff]
11 is, in fact, disabled").

12 VI. CONCLUSION

13 Consistent with the foregoing and under sentence four of 42
14 U.S.C. § 405(g),³⁷ IT IS ORDERED that judgment be entered
15 REVERSING the Commissioner's decision, GRANTING Plaintiff's
16 request for remand, and REMANDING this action for further
17 proceedings consistent with this memorandum decision.

18
19 DATED: May 29, 2019



JEAN ROSENBLUTH
U.S. MAGISTRATE JUDGE

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26
27 ³⁷ That sentence provides: "The [district] court shall have
28 power to enter, upon the pleadings and transcript of the record,
a judgment affirming, modifying, or reversing the decision of the
Commissioner of Social Security, with or without remanding the
cause for a rehearing."